Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SIMPLY FRESH FRUIT, INC. & P&C SERVICES, INC.
Petitioners,

v.

THE CONTINENTAL INSURANCE COMPANY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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74 pp

Questions Presented For Review

1. Whether potential claims for trade dress infringement, false designation of origin and unfair competition in violation of the Lanham Act inherently involve "advertising activity".

2. Whether as a matter of law patent infringement claims within the meaning of 35 U.S.C. Section 271 in effect prior to January 1, 1996 can occur in the course of an insured's advertising activities.

3. Whether under California law a "duty to defend" attaches to potential claims in violation of the Lanham Act and Patent Act.

The Parties

The parties to this petition are listed in the caption of this case. In accordance with Supreme Court Rule 29.6, petitioners disclose that Unimark Group, Inc. is the parent company of petitioners and that the Continental Corporation is the parent company of Respondent.

TABLE OF CONTENTS

Page

Questions Presented For Review i

The Parties ii

Opinions Below 1

Jurisdiction 2

Constitutional Provision And Statutes Involved . 2

Statement of the Case 5

Background 5

Reasons For Allowance Of The Writ . . 8

Argument 9

I. Potential Claims For Trade Dress Infringement, False Designation Of Origin Under The Lanham Act Inherently Involve "Advertising Injury" 9

II. Patent Infringement May Occur In The Course Of An Insured's Advertising Activities 11

TABLE OF CONTENTS-cont

Page

III. Under California Law A "Duty To Defend" Attaches To Potential Claims Under The Lanham Act And Patent Act 15

Conclusion 17

APPENDICES

Appendix A. Memorandum from the Court of Appeals for the Ninth Circuit, numbered A- 2 thru A-11.

Appendix B. Order from District Court, numbered B-12 thru B-25.

Appendix C. Order of the Court of Appeals for the Ninth Circuit May 28, 1996, numbered C-26.

Appendix D. Judgment of the Court of Appeals for the Ninth Circuit May 30, 1996, numbered D-27.

TABLE OF AUTHORITIES

Cases Page

Advance Watch Co. v. Kemper National Ins.,
878 F.Supp. 1034 (E.D. Mich. 1995). 10

Bank of the West v. Superior Court,
2 Cal. 4th 1254 (1992) 10

Everest and Jennings, Inc. v. American
Motorists, Ins. Co.,
23 F.3d 226 (9th Cir. 1994) 14

Gray v. Zurich Insurance Co.,
65 Cal. 2d 263 (1966) 15,16

Horace Mann Insurance Co. v. Barbara B.,
4 Cal. 4th 1076 (1993) 16,17

Iolab Corp. v. Seabord Surety Co.,
15 F.3d 1500 (9th Cir. 1994) 14

John Deere Ins. Co. v. Shamrock Ind. Inc.,
696 F.Supp. 434 (D. Minn. 1988)
aff'd. 920 F.2d 413 (8th Cir. 1991) 18

Markman v. Westview Instruments, Inc.
____ U.S. ____, 116 S. Ct.
1384 (1996) 13

TABLE OF AUTHORITIES - cont

Cases Page

Montrose Chemical Corp. of California v. Superior Court,
6 Cal. 4th 287 (1993) 15,16

Neff Instrument Corp. v. Cohu Electronics, Inc.,
269 F.2d 668 (9th Cir. 1959) 13

New Hampshire Ins. Co. v. R. L. Chaides Construction Co.,
847 F.Supp. 1452 (N.D. Cal. 1994) 17

New West Corp. v. NYM Co. of California, Inc.,
595 F.2d 1194 (9th Cir. 1979). 9

Pitcarin v. United States,
547 F.2d 1106 (Ct. Cl. 1976),
cert. denied, 434 U.S. 1051 (1978) 12

Poof Toy Products, Inc. v. U.S. Fidelity and Guaranty Co.,
891 F.Supp. 1228 (E.D. Mich. 1995) 10

Roberts v. Ryer,
91 U.S. 150 (1875) 13

TABLE OF AUTHORITIES - cont

Page

Roche Products, Inc. v. Bolar
Pharmaceutical Co., Inc.,
733 F.2d 858 (Fed. Cir.),
cert. denied, 469 U.S. 856 (1984) 12

Sentex Systems v. Hartford Accident
and Indemnity Co.,
882 F.Supp. 930 (C.D. Cal. 1995),
aff'd. ___ F.3d ___,
WL 467048 (9th Cir. (Cal.)) 17

Two Pesos, Inc. v. Taco Cabana, Inc.,
505 U.S. 763 (1992) 9

Constitution

United States Constitution, Article I, § 8,
Clause 8 2

Statutes

15 U.S.C. § 1125 3,4
15 U.S.C. § 1125(a),
Section 43(a) of the Lanham Act 9,10,11
15 U.S.C. § 1127 4
28 U.S.C. §1254(1) 2
28 U.S.C. §1291 5
28 U.S.C. §1332(a) and (c) 5,7
35 U.S.C. § 154 11

TABLE OF AUTHORITIES - cont

Page

35 U.S.C. § 271 (a) 2,3,11,12,14,15
35 U.S.C. § 271 (b)(c) 3
Cal. Civ. Code, § 1636 4,16
Cal. Civ. Code, § 1644 4,5,16
Cal. Civ. Code, § 1649 5,16
Cal. Civ. Code, § 1654 5,16,17

Treatises

McCarthy on Trademarks and Unfair Competition,
3d ed. 1992 § 27.03 (2) (a) 9

Other Sources

Webster's Third New International Dictionary, unabridged (1986) 15

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IN THE
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OCTOBER TERM, 1996

SIMPLY FRESH FRUIT, INC. & P&C SERVICES, INC.
Petitioners,

v.

THE CONTINENTAL INSURANCE COMPANY
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

The petitioners, Simply Fresh Fruit, Inc. and P & C Services, Inc., respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, Appeal No. 94-56061.

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit (App. A, infra, pp. A-2 thru A-11) is reported in 84 F.3d 1105. In an Order and Amended Opinion dated August 16, 1996, the Court deleted Footnote 2, from the reported opinion.

The opinion and order of the district court entered on June 28, 1994 (App. B, infra pp. B-12 thru B-25) from which appeal to the Court of Appeals for the Ninth Circuit was taken.

An order on rehearing of the Court of Appeals for the Ninth Circuit filed on May 28, 1996. (App. C, infra, p. C-26).

The judgment of the Court of Appeals for the Ninth Circuit entered on May 30, 1996 (App. D, infra, p. D-27).

Jurisdiction

The opinion of the Court of Appeals for the Ninth Circuit was entered on May 30, 1996. The jurisdiction of this Court is invoked under the United States Code, Title 28, Section 1254(1).

Constitutional Provision And Statutes Involved

To Promote the Progress of Science and Useful Arts, by Securing for Limited Times to Authors and Inventors the Exclusive Right to their Respective Writings and Discoveries.

[U.S. Constitution, Article I, § 8, cl. 8.]

Infringement of patent

(a) Except as otherwise provided in this title [35 USC §271 et seq.], whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor,

infringes the patent[1].

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.

* * * * *

[35 U.S.C. § 271]

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which

(a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or

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[1] Title 35, Section 271 (a) was amended effective January 1, 1996 to read in pertinent part as follows:

(a) Except as otherwise provided in this title [35 U.S.C. § 1 et seq.], whoever without authorization makes, uses, offers to sell, or sells any patented invention (emphasis added).

association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

* * * * *

[15 U.S.C. § 1125]

The intent of this Act is to regulate commerce within the control of congress by making actionable the deceptive and misleading use of marks in such commerce; *** to protect persons engaged in such commerce against unfair competition.

* * * * *

[15 U.S.C. §1127]

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so for as the same is ascertainable and lawful.

* * * * *

[Cal. Civ. Code, § 1636]

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them

by usage, in which case a letter must be followed.

* * * * *

[Cal. Civ. Code, § 1644]

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

* * * * *

[Cal. Civ. Code, § 1649]

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.

* * * * *

[Cal. Civ. Code, § 1654]

Statement of the Case

Background

The decision upon which review is sought is the Court of Appeals for the Ninth Circuit affirmance of the district court's granting of summary judgement. The district court had jurisdiction over the lawsuit pursuant to 28 U.S.C. §1332(a) and (c). Jurisdiction of the Court of Appeals to consider the district court's order was pursuant to 28 U.S.C. §1291. The original action was commenced by Simply Fresh Fruit, Inc. ("Simply Fresh") and P & C Services, Inc. ("P & C") (collectively "Petitioners") against The Continental Insurance Company ("Respondent") for breach

of contract and the implied covenant of good faith and fair dealing. The district court in applying California law held that the respondent had no duty to defend the petitioners in a third party's state misappropriation of trade secrets or federal patent infringement suits under the "advertising injury" provisions of their insurance policies.

Petitioners are in the business of processing and selling fresh fruit and fruit segments for use in salads and similar products [App. A, p. A-3]. At the time the lawsuits at issue arose Simply Fresh had engaged the services of P & C use its primary processing facility for its first products. Petitioners held separate insurance contracts with respondent the insurer whereby it agreed to defend and indemnify them for injuries suffered as a result of their business advertising activities.

Under the terms of respondent's insurance policies issued to petitioners, coverage extended to "advertising injury" only if caused by an offense: (1) in the "coverage territory" during the policy period; and (2) in the "course of advertising" their goods, products or services. Further for purposes of coverage, the relevant provisions defined "advertising injury" to include any "misappropriation of advertising ideas or style of doing business" [App. A, p. A-3].

During the time the policies were in effect, one of Simply Fresh's competitors, Reddi-Made Foods, Inc. ("Reddi-Made"), filed three lawsuits ("collectively the underlying actions") against petitioners. The first action was filed in California state court and contained allegations of (1) misappropriation of trade secrets, (2) breach of contract, (3)

violation of the uniform Trade Secrets Act, and (4) intentional interference with economic advantage. The second and third actions were filed in federal district and, once consolidated, alleged claims for patent infringement, contributory infringement and inducing infringement [App. A, p. A-4]. Although not included in the allegations of Reddi-Made's complaints, the record before the district court and Court of Appeals indicated that petitioners would on occasion give prospective and current customers tours of their newly automated processing facilities in order to highlight the improved quality of their cut fruit products [App. A, p. A-4].

Petitioners tendered the defense of the underlying actions to respondent. Respondent refused the tendered defense and denied coverage. Thereafter, Reddi-Made and petitioners settled the underlying actions, which were then dismissed with prejudice. The federal lawsuit pursuant to 28 U.S.C. section 1332 between the petitioners and respondent then followed [App. A, p. A-5].

On April 18, 1994, respondent filed a motion for summary judgment or partial summary judgment. Petitioners filed an opposition on June 6, 1994 and subsequently filed cross-motions for summary judgment on June 16, 1994. All the motions were removed from the calendar and taken under submission by the district court prior to the scheduled hearing date [App. A, p. A-5].

On June 28, 1994, the district court granted respondent's motion for summary judgment, and found that summary judgment in favor of respondent rendered the

cross-motions of petitioners moot [App. A, p. A-5].

A timely appeal was filed by petitioners on July 19, 1994. On May 28, 1996 the Court of Appeals for the Ninth Circuit affirmed the district Court's judgment [App. C, p. C-26].

On March 21, 1996, petitioners filed a petition for rehearing with suggestion for rehearing en banc. On May 28, 1996 the Court of Appeals for the Ninth Circuit denied the petition and the judgment affirming the district court's judgment was entered [App. D, p. D-27].

Reasons For Allowance Of The Writ

The Court of Appeals for the Ninth Circuit has, in this case, rendered a decision which is in conflict with Federal Constitutional and Statutory provisions relating to the scope of protection given to patentees to exclude others from making, using or selling their patented inventions as well as the decisions of the Supreme Court and Court of Appeals for the Federal Circuit interpreting the same. The Ninth Circuit decision is also in conflict with the statutory provisions of the Lanham Act, and prior Supreme Court and Ninth Circuit decisions as they relate to advertising activities which may support an action for trade dress infringement and false designation of origin.

Additionally, in rendering its decision, the Ninth Circuit has interpreted California law that is in conflict with both California statutory and decisional law as it relates to the interpretation of insurance contracts. Thus, petitioners

submit that this Court's granting of certiorari is justified.

Argument

I.

Potential Claims For Trade Dress Infringement, False Designation Of Origin And Unfair Competition Under The Lanham Act Inherently Involve "Advertising Activity".

When Section 43(a) of the Lanham Act (15 U.S.C. 1125 (a)) is used as a federal vehicle for asserting claims of trade dress infringement, false designation of origin and unfair competition the courts have used as substantive law the traditional rules of trademark infringement. See, Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 776 (1992). There Justice Stephens in a concurring opinion stated:

> [T]he Court interprets this section [§43(a)] as having created a federal cause of action for infringement of unregistered trademark or trade dress and concludes that such a mark or trade dress should receive essentially the same protection as those that are registered.

Thus, the test of liability is likelihood of confusion. See New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194 (9th Cir. 1979).

Moreover, as set forth in McCarthy on Trademarks and Unfair Competition (3d ed. 1992 § 27.03 (2) (a)):

> In accordance with the rule in mainstream trademark law, under Lanham § 43(a) neither proof of actual injury nor proof of actual confusion is necessary. Thus, it is error for a court to find that plaintiff failed to prove injury caused by actual confusion and conclude that plaintiff has failed to establish a violation of § 43(a) (emphasis added).

Several courts have also held that "allegations of trademark and trade dress infringement inherently involve advertising activity"[2]. See Poof Toy Products, Inc. v. U.S. Fidelity and Guaranty Co., 891 F.Supp. 1228, 1234 (E.D. Mich. 1995). See also Advance Watch Co. v. Kemper National Ins., 878 F.Supp. 1034, 1039 (E.D. Mich. 1995).

In the present case, the Court of Appeals addressed this issue by saying:

> Under our decision in Microtec, even if [the potential claims for trade dress infringement, false designation of origin in violation of the Lanham Act, and common law unfair competition claims] could have been added, no potential coverage would exist under the advertising injury clause (emphasis added).

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[2] Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1258 (1992) cited by the Ninth Circuit in its decision, does not define "advertising" nor did it address any issues involving the "duty to defend".

However, for the reasons set forth above petitioners submit that this holding is in direct contravention of prior Supreme Court and mainstream trademark law as it applies to § 43(a) Lanham Act violations which justifies a writ being issued in this case.

II.

Patent Infringement May Occur In The Course Of An Insured's Advertising Activities.

Title 35 U.S.C. § 271(a) prior to its amendment on January 1, 1996 incorporated the disjunctive language of the statutory patent grant which gives a patentee the "right to exclude others from making, using, or selling" a patented invention. See 35 U.S.C. § 154. Section 271(a) in force prior to January 1, 1996, under which this case is applicable, states as follows:

> [W]hoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefore, infringes the patent.

In determining what type of conduct constitutes patent infringement the Court of Appeals for the Federal Circuit has held:

> It is beyond argument that performance of only <u>one</u> of the three enumerated activities is patent infringement. It is well established, in particular, that the <u>use</u> of a patented invention, without either manufacture or sale, is actionable. Thus, the patentee does not

> need to have any evidence of damage or lost sales to bring an infringement action (emphasis original) (citations omitted).

Roche Products, Inc. v. Bolar Pharmaceutical Co., Inc., 733 F.2d 858, 861 (Fed. Cir.), cert. denied, 469 U.S. 856 (1984) (superseded by statute).

Although the Court of Appeals for the Federal Circuit has not expounded on the outer limits of what constitutes "use" under 35 U.S.C. § 271(a), its most detailed pronouncement on the subject is its statement in Roche Products, 733 F.2d at 861:

> Because Congress has never defined use, its meaning has become a matter of judicial interpretation. Although few cases discuss the question of whether a particular use constitutes an infringing use of a patented invention, they nevertheless convincingly lead to the conclusion that the word "use" in section 271(a) has never been taken to its utmost possible scope.

In support of this statement the Federal Circuit referred specifically to the case of Pitcarin v. United States, 547 F.2d 1106 (Ct. Cl. 1976), cert. denied, 434 U.S. 1051 in holding:

> Tests, demonstrations, and experiments *** [which] are in keeping with the legitimate business of the *** [alleged infringer]" are

> infringements for which [e]xperimental use is not a defense (citations omitted).

The extensive breadth of use has also been previously embraced by this Court in the decision of Roberts v. Ryer, 91 U.S. 150 (1875). There the Court held that an inventor "is entitled to the benefit of all the uses to which" a patented invention can be put. Roberts, 91 U.S. at 157.

Likewise the most recent pronouncement of this Court in Markman v. Westview Instruments, Inc., ____ U.S. ____, 116 S.Ct 1384, 1387 (1996) mirrors the Roberts, and Roche Products holdings, in stating:

> [L]ike their modern counterparts, [prior patent acts] granted inventors "the right to exclude others from making, using, offering for sale, selling, or importing the patented invention (citations omitted).

In fact the Ninth Circuit Court of Appeals has also previously given the term "use" a broad meaning. See, Neff Instrument Corp. v. Cohu Electronics, Inc., 269 F.2d 668, 674 (9th Cir. 1959). There the court in holding that demonstrations of an alleged infringing device at trade shows and numerous trade advertisements were sufficient grounds for a patent infringement action stated:

> [E]ven the threat to use patented subjected matter may give right to a cause of action. If this be so, how can we view appellee's sales convention appeals and its numerous paid

> advertisements (without the slightest indication of any attempt being made to restrict sales to governmental agencies or to private companies with governmental contracts) as other than a threat to manufacture and sell infringing machines?

In the present case, the Court of Appeals in holding that "as a matter of law patent infringement cannot occur in the course of an insured's advertising activities" stated:

> The gravamen of the patent infringement claim is the use alone. See, e.g. Iolab [Corp. v. Seabord Surety Co., 15 F.3d 1500, (9th Cir. 1994)] at 1506 ("a patent is infringed by making, using, or selling a patented invention, not by advertising it"); Everest [and Jennings, Inc. v. American Motorists, Ins. Co.], 23 F.3d [226, (9th Cir. 1994)] at 229 ("the statutory definition of patent infringement [under 35 U.S.C. § 271(a)] refers only to the making, using or selling of a product") (emphasis in original) [App. A, p. A-10].

Petitioners submit that the holding in the present case is in direct conflict with both the Congressional intent in enacting Title 35, Section 271(a) and the prior Supreme Court and Federal Circuit judicial interpretation of what constitutes "use" under the patent statute.

Furthermore, in applying the above case rationale to the present petition, this Court should take judicial notice that it is common knowledge that "advertising"[3] is an important medium of obtaining business. Therefore, "advertising" a patented device becomes at some point a substantial source of business and should not be treated as an exception to the general rule that the "use" of a patented device is forbidden.

Likewise in the present situation, petitioners submit that the Court of Appeals should not have treated "advertising" as being an insufficient act to support a claim for patent infringement within the meaning of 35 U.S.C. § 271(a). Thus, the granting of petitioner's writ is proper.

III.

Under California Law A "Duty To Defend" Attaches To Potential Claims Under The Lanham Act And Patent Act.

It is well established in California law that an insurer's duty to defend its insured is extremely broad. The insured need only show a "bare potential or possibility" that a claim would be covered by an insurance policy to trigger the duty to defend. Montrose Chemical Corp. of California v. Superior Court, 6 Cal. 4th 287, 300 (1993); see also Gray v. Zurich Insurance Co., 65 Cal. 2d 263 (1966);

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[3] According to Webster's Third New International Dictionary, unabridged (1986), "advertising" is the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public, especially by means of printed or broadcast announcements".

Horace Mann Insurance Co. v. Barbara B., 4 Cal. 4th 1076 (1993).

As the California Supreme Court has explained, "[i]mposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense in its behalf" Montrose, 6 Cal. 4th at 295 (citation omitted).

As a result of the insured's reasonable expectation of a defense for all claims that raised a "potential" of liability under a policy, the California Supreme Court has allocated each party's burden of proof accordingly in a duty to defend case in holding:

> [T]he insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within the policy coverage; the insurer must prove it cannot. Montrose, 6 Cal. 4th at 300 (emphasis in original).

In analyzing the possibility of coverage under an insurance policy, the court must look to the allegations in the complaint as well as to any other facts from any other facts from any other sources that were available to the insured. Gray, 65 Cal. 2d at 176-177.

Moreover, as set forth in Horace Mann, 4

Cal. 4th at 1181 any doubts as to whether the facts give rise to a duty to defend are resolved in the insured's favor. See also California Civil Code sections 1636, 1644, 1649 and 1654.

To determine whether respondent owed a duty to defend petitioners with respect to the underlying actions, the following three elements must be satisfied: (1) petitioners must have been engaged in "advertising activity" during the policy period when the alleged "advertising injury" occurred; (2) Reddi-Made's allegations must have raised a "potential" for liability under one of the covered offenses; and (3) there must have been a causal connection between the alleged injury and the "advertising activity". See New Hampshire Ins. Co. v. R. L. Chaides Construction Co., 847 F.Supp. 1452, 1455 (N.D. Cal. 1994) and Sentex Systems v. Hartford Accident and Indemnity Co., 882 F.Supp. 930, 940-45 (C.D. Cal. 1995), aff'd. ___ F.3d ___, WL 467048 (9th Cir. (Cal.))[4].

As set forth in the decision of the district court there was no dispute that Reddi-Made's alleged injuries occurred during the time respondent's policies issued to petitioners were in effect. Furthermore, the record on appeal substantiates a finding that petitioners were engaged in "advertising activity" and that Reddi-Made's allegations raised a "potential" for liability under respondent's insurance

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[4] The Ninth Circuit decision in Sentex appears to contradict the Court of Appeals' prior holding in the Simply Fresh case as it relates to the "potential" for liability both before and after the amended opinion in the latter case. This inconsistency is further amplified by the Ninth Circuit's prior holding in deleted footnote two that the underlying actions in both Sentex and Simply Fresh had "striking factual similarity".

policies.

Finally, petitioners also provided substantial evidence in the record on appeal that their in-house and trade show presentations were at a minimum possibly advertising injury. This advertising activity clearly establishes a sufficient causal connection between Reddi-Made's alleged injuries and petitioners' advertising activities.

In applying the above test to the instant case, it is abundantly clear from both the record on appeal and prior Federal and State decisional law as set forth above that petitioners provided ample evidence of a possibility of coverage under the respondent's policies for "advertising injuries"[5]. Under these circumstances respondent owed petitioners a duty to defend. Thus, petitioners submit that the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant the petition for certiorari herein in order to resolve the intention of Congress as set forth in both the Patent and Lanham Act as to what constitutes acts of patent infringement and violations of the Lanham Act and the intention of the California Supreme

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[5] See John Deere Ins. Co. v. Shamrock Ind. Inc., 696 F. Supp. 434, 440 (D. Minn. 1988), aff'd. 920 F.2d 413 (8th Cir. 1991) [One letter by the Insured to a single customer soliciting the sale of a product, combined with one product demonstration to customers, was sufficient "advertising activity" to trigger coverage under the policy].

Court as to what constitutes "advertising injury" under an insurance contract.

Respectfully submitted,
LAW OFFICES OF HUEBNER & ROSA

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APPENDICES

APPENDICES.

Appendix A. Memorandum from the Court of Appeals for the Ninth Circuit, numbered A-2 thru A-11.

Appendix B. Order from District Court, numbered B-12 thru B-25.

Appendix C. Order of the Court of Appeals for the Ninth Circuit May 28, 1996, numbered C-26.

Appendix D. Judgment of the Court of Appeals for the Ninth Circuit May 30, 1996, numbered D-27.

APPENDIX A.

Memorandum from the Court of Appeals for the Ninth Circuit

In the United States Court of Appeals, For the Ninth Circuit.

No. 94-56061, Simply Fresh Fruit, Inc. & P&C Services, Inc., Plaintiffs-Appellants, v. The Continental Insurance Company, Defendant-Appellee.

Appeal from the United States District Court for the Central District of California Hon. Lourdes G. Baird, District Judge, Presiding D.C. No. CV 93-6136-LGB, CV-93-6137-LGB.

Argued and submitted February 9, 1996, Pasadena, California.

Before Poole, Wiggins and Rymer, Circuit Judges.

Simply Fresh Fruit, Inc. and P & C Services, Inc. (collectively "Appellants") appeal the district court's grant of summary judgment in favor of their insurer, Continental Insurance Company, on their complaints for breaches of contract and the implied covenant of good faith and fair dealing. The district court found that Continental did not have a duty to defend Simply Fresh and P & C in two earlier actions brought by a third-party for misappropriation of trade secrets and patent infringement. Applying California law, the district court held that the

underlying actions were not covered under the "advertising injury" provision of the appellants' insurance policies. We affirm.

I.

Simply Fresh is in the business of processing and selling fresh fruit and fruit segments for use in salads and similar products. At the time the lawsuits at issue here arose, Simply Fresh had engaged the services of P & C as its primary processing facility for its fruit products. Simply Fresh and P & C held separate insurance contracts with Continental whereby the insurer agreed to defend and indemnify them for injuries suffered as a result of their business advertising activities.

Under the policy terms, coverage extended to "advertising injury" only if caused by an offense committed: (1) in the "coverage territory" during the policy period; and (2) in the course of advertising their goods, products or services. Further, for purposes of coverage, the relevant provisions defined "advertising injury" to include any "misappropriation of advertising ideas or style of doing business."

During the time the policies were in effect, one of Simply Fresh's competitors, Reddi-made Foods Company, Inc. ("Reddi-Made"), filed three lawsuits (collectively "the underlying actions") against Simply Fresh and P & C. The first action was filed in California state court and contained allegations of: (1) misappropriation of trade secrets, (2) breach of contract, (3) violation of the Uniform Trade Secrets Act, and (4) intentional interference with economic advantage. The second and third actions

were filed in federal district court and, once consolidated, alleged claims for patent infringement, contributory infringement and inducing infringement.

The gravamen of Reddi-Made's state court action was that Simply Fresh and P & C had misappropriated its secret automated process for slicing fruit. The allegations underlying this complaint were that a former mechanic for Reddi-Made, while still employed by Reddi-Made, began to build an identical fruit cutting system and production line for Simply Fresh. Subsequently, Simply Fresh hired another ex-employee of Reddi-Made's, who allegedly solicited a third Reddi-Made employee to steal various parts from the processing system. At all times during these events, the Reddi-Made employees were parties to confidentiality agreements. Reddi-Made's complaint alleged that as a result of this misappropriation of its trade secrets, Simply Fresh was able to significantly cut its production costs and effectively destroy Reddi-Made's economic advantage.

In the federal actions, Reddi-Made alleged that Simply Fresh and P & C infringed its patents in the fruit-cutting device and processes by using them in their manufacturing operations. Further, Reddi-Made alleged that Simply Fresh had induced and contributed to P & C's infringement of its patented cutting devices and operating processes. Although not included in the allegations in Reddi-Made's complaints, appellants admit that they would on occasion give prospective and current customers tours of their newly automated processing facilities in order to highlight the improved quality of their fruit products.

Simply Fresh and P & C tendered the defense of both the federal and state actions to Continental. Continental refused the tendered defenses and denied coverage. Subsequently, Reddi-Made and the appellants settled the underlying actions, which were dismissed with prejudice. This diversity action pursuant to 28 U.S.C. § 1332 between the insurer and the appellants followed.

On April 18, 1994, Continental filed a motion for summary judgment or partial summary judgment. Simply Fresh and P & C filed and opposition on June 6, 1994, and subsequently filed cross-motions for summary judgment on June 16, 1994. All the motions were scheduled to be heard on July 11, 1994; however, the motions were removed from the calendar and taken under submission by the district court prior to the scheduled hearing date.

On June 28, 1994, the district court granted Continental's motion for summary judgment, and found that the summary judgment in favor of Continental rendered the cross-motions moot. This timely appeal followed, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I.

We review a district court's grant of summary judgment de novo. Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Our task is to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id.

Relying on the express policy language and the undisputed fact that the policies were in effect at all times relevant to this litigation, the district court found that, under California law, Continental had no duty to defend either the state trade secret action or the federal patent claim. The district court based its conclusion on the California Supreme Court's interpretation of the scope of "advertising injury" coverage expressed in Bank of the West v. Superior Court, 2 Cal. 4th 1254 (1992).

In Bank of the West, the California Supreme Court held that any "'advertising injury' must have a causal connection with the insured's 'advertising activities' before there can be coverage." 2 Cal. 4th at 1277. We address the district court's application of Bank of the West to each of the underlying actions in turn. We note preliminarily, however, that we agree with the district court's conclusion that under the clear language of the policies, coverage is provided for "'advertising injury' only if it was committed by Simply/P & C [sic] in the course of advertising their goods, products or services." In other words, any of the policy's enumerated advertising in order to satisfy Bank of the West's nexus requirement. See Bank of the West, 2 Cal. 4th at 1265 (a "court must interpret the language in context, with regard to its intended function in the policy.").

A. The State Misappropriation of Trade Secrets Claims

We note from the outset that the duty to defend is broad in California. See Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 276 (1966) ("courts do not examine only the pleaded word but the potential liability created by the

suit."). However, the seminal Gray case added the caveat that "the insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." Id. at 275 n. 15.

Simply Fresh and P & C assert that Reddi-Made's state law misappropriation of trade secrets claims alleged facts that could potentially give rise to claims for trade dress infringement, false designation of origin in violation of the Lanham Act, and common law unfair competition.[1] Further, they argue, any of these potential claims could reasonably fall within the "misappropriation of style of doing business" language of the policy, thus triggering Continental's duty to defend.

Even if we accept the appellants' argument, or recent decision in Microtec Research Inc., et al. v. Nationwide Mutual Ins. Co., et al., 40 F.3d 968 (9th Cir. 1994), would compel us to affirm the district court's finding that the allegations in the trade secret action did not arise in the course of Simply Fresh's advertising activities. The allegations in the underlying dispute in Microtec were virtually identical to those asserted by Reddi-Made. Id. at 970 (complaint included claims for inter alia, breach of contract, misappropriation of trade secrets, intentional interference with prospective economic advantage).

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[1] Indeed, the appellants assert that when the defenses were tendered to Continental, Reddi-Made could at any time have amended its complaint to include such claims. As we discuss Infra, however, under our decision in Microtec, even if these specific causes of actions could have been added, no potential coverage would exist under the advertising injury clause.

Although the insured in Microtec allegedly "passed off," or advertised, its competitor's intellectual property as its own, we noted that "[t]he complaint conspicuously and carefully omit[ted] to allege any wrongdoing with respect to [Microtec's] advertisements." Id. at 971 ("If Microtec had been able to establish that it faced potential liability for those advertisements, it might have arguably had a claim against its insurers under Gray [citations and internal quotations omitted] . . . .[however] there was no potential liability based on these . . . .advertisements, because Green Hills elected not to make that claim."). As we went on to note in Microtec, the "harm . . . . is allegedly caused by misappropriation of the [trade secret], not by the advertising itself." Id.

Appellants produced no evidence on summary judgment that Reddi-Made had suffered damages because of their advertising in order to prove the elements of any such claim. Thus, the appellants' argument utterly fails to address the correct causation requirement under the language of the policy and California law.[2]

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[2] The appellants draw our attention to the recent case of Sentex Systems v. Hartford Accident and Indemnity Co., 882 F.Supp. 930 (C.D. Cal. 1995), which addressed a similar insurance coverage dispute involving an underlying action with striking factual similarity to Reddi-Made's state court action. The Sentex court held that the misappropriation of a competitor's trade secret by a former employee for use in the promotion of the insured's products raised a potential for liability under the covered offense of "misappropriation of advertising ideas or style of doing business." Id. at 944. We do not find the Sentex court's reasoning persuasive for two reasons. First, it disregards our conclusion in Microtec that "the injury for which coverage is sought must

B. The Federal Patent Infringement Claims

The appellants argue that the Bank of the West causal nexus requirement is satisfied here because their alleged use of Reddi-Made's patented devices and processes occurred in concert with the advertising and promotion of their fruit products. This argument is flawed for two reasons.

First, we have previously held that, as a matter of law, patent infringement cannot occur in the course of an insured's advertising activities. See, e.g., Iolab Corp. v. Seaboard Surety Co., 15 F.3d 1500, 1505 (9th Cir. 1994) (holding that infringement claim based on manufacture and sale of patented lens did not arise out of the insured's advertising activities under Bank of the West); Everest and Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 229 (9th Cir. 1994) (drawing same conclusion based on policy language identical to that used in the case at bar); see also New Hampshire Ins. Co. v. R. L.Chaides Construction Co., 847 F.Supp. 1452, 1456-57 (N.D. Cal. 1994) (holding

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be caused by the advertising itself." See Microtec, 40 F. 3d at 971. In Sentex as here, the misappropriation of trade secrets occurred prior to any advertisement of products or services. Simply stated, the advertising did not cause the misappropriation. Second, the Sentex court relies heavily on case law from another federal district which, as noted by the California Supreme Court, did not resolve the issue of the causal connection between "advertising injury" and "advertising activities." See Bank of the West, 2 Cal. 4th at 1275 (discussing John Deere Ins. Co. v. Shamrock Industries, Inc., 696 F. Supp. 434, 440 (D.Minn. 1988), aff'd 920 F.2d 413 (8th Cir. 1991)). Now that the issue has been conclusively resolved by the California Supreme Court, that resolution must control.

that patent infringement cannot be committed in the course of advertising activities).

Here, Reddi-Made's federal claims for direct, contributory and inducing infringement all accrued when Simply Fresh and P & C allegedly used its patented devices and processes. This injury has no causal connection to any advertising activities as a matter of law because it could have occurred independent and irrespective of any advertising by the appellants. That Simply Fresh exploited its alleged use of the patented processes in conjunction with its product promotion activities is immaterial. The gravamen of the patent infringement claim is the use alone. See, e.g., Iolab, 15 F.3d at 1506 ("a patent is infringed by making, using, or selling a patented invention, not by advertising it"); Everest, 23 F.3d at 229 ("the statutory definition of patent infringement [under 35 U.S.C. § 271(a)] refers only to the making, using or selling of a product").

Second, the appellants' argument would lead this court to a finding that when the alleged infringement (e.g. use) of a patented process constitutes a form of advertisement, the causal nexus of Bank of the West is satisfied. As such, they argue, and insurer cannot avoid its contractual duty to defend.

However, this argument ignores the plain language of the policy. Appellants maintain, in effect, that because they exposed their alleged infringement of Reddi-Made's patented processes through their product promotion, their conduct falls within the coverage of Continental's policy. As noted, however, under the policy, the advertising

activities must cause the injury--not merely expose it. Accord Iolab, 15 F.3d at 1507 (noting that insured failed to show that patent holder's loss was caused by its advertising, rather than its infringement); Everest, 23 F.3d at 229 (noting that patentee's claim never asserted that infringement occurred because of insured's advertising); Microtec, 40 F.3d at 971 ("It is now the clearly established law in California . . . . that the injury for which coverage is sought must be caused by the advertising itself."). We therefore agree with the district court that the appellants' advertising activities did not cause the injuries alleged in Reddi-Made's federal patent infringement claims.

II.

Based on the foregoing discussion, we hold that Continental had not duty to defend Simply Fresh and P & C in Reddi-Made's state trade secret or federal patent infringement suits under the advertising injury provisions of their insurance policies. The judgment of the district court is **AFFIRMED.**

APPENDIX B.

Order from District Court.

United States District Court Central District of California.

Simply Fresh Fruit, Plaintiff, v. The Continental Insurance Company, Defendant., Case No. CV-93-6136 (Consolidated), P & C Services, Inc., Plaintiff, v. The Continental Insurance Company, Defendant., Case No. CV-93-6137 (Consolidated).

Defendant, the Continental Insurance Company's ("Continental") motions for summary judgment as to the complaints in Simply Fresh Fruit v. The Continental Insurance Company, 93-6136 LGB, and P & C Services, Inc. v. The Continental Insurance Company, 93-617 LGB[1], and Plaintiffs' Simply Fresh Fruit ("Simply") and P & C Services, Inc.. ("P & C")[2] (collectively "Simply/P & C") cross-motions for summary judgment that were scheduled to be heard on July 11, 1994 were taken off calendar and under submission by this Court. After considering the moving and opposing papers, and all other matters presented, this Court GRANTS Continental's

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[1] Simply Fresh Fruit v. The Continental Insurance Company, 9 3-6136 LGB, and P & C Services, Inc. v. the Continental Insurance Company, 93-6137 LGB were consolidated on May 13, 1994,

[2] Simply contracted with P & C to cut fruit for Simply's product line.

motions for summary judgment as to both complaints.[3]

BACKGROUND:

On October 12, 1993, Plaintiffs filed the two complaints in this action which contain the following causes of action:

1. Breach of contract;

2. Breach of implied covenant of good faith and fair dealing; and

3. Breach of fiduciary duty.

On December 6, 1993, the Court dismissed the third cause of action in the complaints. See December 6, 1993 orders. Moreover, on February 4, 1994 this Court dismissed Defendant's counterclaim for declaratory relief in both actions.

the Uncontroverted facts in this action are as follows:

Simply/P & C entered into insurance contracts with Defendant, the Continental Insurance Company ("Continental") pursuant to which Defendant agreed to defend and indemnify Plaintiffs for all advertising injuries

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[3] Based upon this Court granting Defendant's motions for summary judgment, Plaintiffs' cross-motions are MOOT.

suffered by Plaintiffs.[4]

The policies provided coverage for "advertising injury," which is defined under the policies as:

[I]njury arising out of one or more of the following offenses:

> a. Oral or written publication or material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan.

Additionally, the policy provides that:

[t]his insurance applies to 'advertising injury' only if caused by an offense committed:

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[4] The policies, nos. 93 CBPO6078289-92 and no. 93 CBPO6078289-94, have been renewed and were in effect during all times that are relevant to this litigation. See exhibits A & B attached to Ludwigs' declarations.

> (1) in the 'coverage territory' during the policy period; and
>
> (2) In the course of advertising your goods, products or services.

Ludwig decl., exhibit A, pg. 10.

On October 31, 1991 an action was filed against Simply in state court (the "trade secret action").[5] On June 5, 1992, and action was filed against Simply in Federal Court,[6] and on May 7, 1993, another action was filed against Simply in this Court (the "patent actions").[7] Simply/P & C tendered their defense in the trade secret and

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[5] Reddi-Made Foods, Inc. v. Simply Fresh Fruit, Inc., et. al., Los Angeles County Superior Court, Case No. BC041197. The complaint contained the following causes of action:

1. Breach of contract;
2. Unfair competition in violation of the Uniform Trade Secrets Act; and
3. Intentional interference with economic advantage.

Wilkins' decl., exhibit 1.

[6] Thomas Lin v. Simply Fresh Fruit, Inc., 92-3422 LGB. This complaint contained one cause of action for patent infringement. Wilkins' decl. exhibit 2.

[7] Thomas Lin v. Simply Fresh Fruit, Inc., 93-2676 LGB. This complaint contained causes of action for:

1. Patent infringement;
2. Contributory infringement; and
3. Inducing infringement.

Wilkins' decl. exhibit 3.

patent actions to Defendant, however, Defendant refused to provide Plaintiffs' with defenses in these actions. Defendant claimed that the causes of actions in these complaints were outside the scope of the insurance contracts between the parties.

Any conclusion of law deemed to be a finding of fact is hereby incorporated into these findings of facts.

Based upon the above uncontroverted facts, this court makes the following CONCLUSIONS OF LAW.

This Court has jurisdiction over this action based upon diversity, 28 U.S.C. §1332.

A party, moving for summary judgment, may carry its initial burden by pointing out to the district court that there is an absence of evidence to support an element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The non-movant, then must set forth specific facts showing that there remains a genuine issue for trial. A "genuine issue" of material fact exist only when the non-moving party makes a sufficient showing to establish all essential elements to that party's case, and on which that party would bear the burden of proof at trial. Id.; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

ANALYSIS:

A. Defendant's motion

1. Duty to defend

Continental asserts that this Court must grant its motion for summary judgment as to the causes of action in both complaints because it did not have a duty to defend Simply/P & C in the underlying actions.

The law is clear in California; and insurer is obligated to defend a suit that seeks damages which potentially are within the coverage of its policy. Gray v. Zurich Ins., Co., 65 Cal. 2d 263 (1988); CNA Casualty of Cal. v. Seaboard Surety Co., 176 Cal. App. 3d 598, 605 (1986); Saylin v. Cal. Ins. Guarantee Ass'n, 179 Cal. App. 3d 256, 263 (1986).

However, the duty to defend is not absolute; it is determined by the nature and kind of risks that are covered by the policy. State Farm & Casualty Co. v. Drasin, 152 Cal. App. 3d 864, 869 (1984). The insurer does not need to defend if the allegations in the complaint do not raise a single issue which could bring the action within the policy's coverage. Gray, 65 Cal. 2d 263.

It is undisputed that the "advertising injury" provision in the policies is the only applicable section to the actions that are currently before this court.

As indicated supra, the policies provide

coverage for "advertising injury" only if it was committed by Simply/P & C in the course of advertising their goods, products or services. Ludwig decl., exhibit A, pg. 10.

Thus, to rule on Defendant's motions, this Court must determine whether the alleged injury to the underlying Plaintiffs arose in the course of Simply/P & C's advertising their goods, products and/or services.

In Bank of the West v. Superior Ct., 2 Cal. 4th 1254, 1273 (1992), the court analyzed the type of injury that was required for a claim to fall within the advertising injury provision of an insurance policy. The applicable provision of the policy that was at issue in Bank of the West indicated that coverage existed only if the conduct occurred "in the course of the . . . insured's advertising activities." Id., 2 Cal. 4th at 1273. Thus, the policies that are at issue in this action are virtually identical to the one that was before the Court in Bank of the West. The Bank of the West Court stated that for a cause of action to fall within the advertising injury provision of an insurance policy, it must have a causal connection with the insured's "advertising activities." Id., 2 Cal. 4th at 1276. The Court noted that its holding was based upon the majority rule and on the common sense interpretation of this provision of the policy.

Further, the Bank of the West Court indicated that an objectively reasonable insured would not and should not expect that and "advertising injury" provision would cover all injuries that related to the insured's business. The Bank of the West Court noted that for an insured to obtain this type of broad coverage, the insured would be required

to purchase several different forms of insurance. Id., 2 Cal. 4th at 1277. Accordingly, the Bank of the West Court held that for an insured to be covered under an advertising injury provision in an insurance policy, the alleged injury must have a causal connection with the insured's actual advertising activities. Id., 2 Cal. 4th at 1277.[8]

a. Trade Secret Action

The trade secret action, which was based upon Simply's alleged misappropriation of the underlying Plaintiff's mechanical device, used for cutting fruit, contained the following causes of action:

1. Breach of contract;

2. Unfair competition; and

3. Intentional interference with contractual relations.

The gravamen of this action was that Simply induced employees of Reddi-Made to steal certain trade

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[8] Plaintiffs argue that this section of the Bank of the West decision was dicta, and is thus not controlling. However, Plaintiffs have failed to read the Bank of the West decision carefully because the Court stated that its analysis regarding the advertising injury issue was an alternative basis for denying coverage to the plaintiff in that action. Thus, Plaintiffs' position is not persuasive.

secrets,[9] which Simply allegedly used to duplicate Reddi-Made's production line.

Plaintiffs assert that allegations in the trade secret action were governed by the advertising injury provision of the policy, because Plaintiffs assert that Thomas Lin, one of the underlying Plaintiffs, was "advertising" the smooth edges of his fruit based upon the pictures in his brochures. Additionally, Plaintiffs assert that the visual appearance of the cut fruit in Lin's brochures disclosed that his cutting device was being used to manufacture the product. Exhibits 11-14 attached to Rosa's decl.

Additionally, Plaintiffs assert that their advertising brochures, which depicted their cut fruit, and their product displays that were used at trade shows "advertised" the smooth cut edges of their products. Exhibits 1 & 2 attached to Strongin's decl. Accordingly, Plaintiffs assert that it is clear that there was a causal connection between the allegations in the trade secret action and Plaintiffs' advertising activities which is sufficient for this Court to find that there was a potential for coverage under the policy.

These are Plaintiff's only arguments that the allegations in the trade secret action, which contained causes

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[9] Specifically, the complaint indicated that Simply induced Reddi-Made employees to steal trade secrets relating Reddi-Made's entire production line, including the layout, conveyer-bet configurations, washing tanks, and cutting devices, and induced those employees to leave Reddi-Made's employment for jobs at Simply.

of action for breach of contract, unfair competition, and intentional interference with contractual relations, arose out of Plaintiffs' advertising their goods, products or services. This Court finds that the allegations in the trade secret action did not arise in the Court of Simply/P & C's advertising its goods, products or services. Bank of the West, 2 Cal. 4th at 1276.

Although an insurer is obligated to defend a suit that seeks damages which potentially fall within the coverage of its policy, an insurer does not have to defend an action if the facts, as in this case, do not raise a single issue which could bring the action within the policy's coverage. Gray, 65 Cal. 2d at 275; CNA Casualty of Cal., 176 App. 3d 605; Saylin, 179 Cal. App. 3d at 263; State Farm Fire & Casualty Co., 152 Cal. App. 3d at 869. Accordingly, Continental did not have a duty to defend Plaintiffs in the trade secret action because the allegations in that complaint did not raise a single issue which could bring the action within the advertising injury provision of the policy.

b. Patent Infringement Actions

The patent infringement actions were based upon the underlying Plaintiff's assertions that Simply/P & C infringed upon the underlying Plaintiff's patented mechanical fruit cutting device.

The law in the Ninth Circuit and California is clear, causes of action for any type of patent infringement do not occur "in the course of" an insured's advertising so as to provide coverage for Simply/P & C under the policies. Aetna Cas. & Sur. Co. v. Superior Court, 19 Cal. App. 4th 320, 328 (1993)[10]; Iolab Corp. v. Seaboard Surety Co., 15 F.3d 1500 (9th Cir 1994).[11]

Thus, according to established case law, there

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[10] Patent infringement cannot be committed in the course of advertising activities. The patentee is not injured because a product incorporating its invention is advertised, but because the infringer, without consent, used or sold a product utilizing a protected invention. Accordingly, patent infringement [and the related causes of action for inducing infringement and contributory infringement] cannot be covered under the [advertising injury provisions of the] policies.

Id., 19 Cal. App. 4th at 328.

[11] In Iolab, the Ninth Circuit held that the insured's advertising activities and the underlying plaintiff's loss for patent infringement did not establish injury provision of the insurance policy. The Iolab Court held that "first, . . . Iolab would have to show its advertising caused the patent infringement, not the liability. Second, Iolab fails to show that the [underlying Plaintiff's loss] was caused by its advertising rather than its infringement of [the] patent." Id.,

was no potential for coverage in the patent actions under the "advertising injury" provision in the policies. Accordingly, Continental did not have a duty to defend Plaintiffs in the patent actions because the allegations in those complaints did not raise a singly issue which could bring the actions within the advertising injury provision of the policy.

2. Analysis of causes of action in the complaints

1. Breach of Contract

The law is clear in California, if an insurance policy does not provide coverage for a loss, the insurer has no contractual obligation under the policy. Warner v. Fire Ins. Exch., 230 Cal. App. 3d 1029 (1991); Horseman's Benevolent & Protective Assn., Inc. v. Insurance Co., of North Am., 222 Cal. App. 3d 816 (1990); Clemco Indus. v. Commercial Union Ins. Co., 665 F.Supp. 816, 830 (N. D. Cal. 1987); aff'd 848 F.2d 1242 (9th Cir. 1988).

Thus, this Court GRANTS Defendant's motion for summary judgment as to the first cause of action in the complaints for breach of contract because Plaintiffs, the party who bears the burden of proof, have failed to provide this Court with any admissible evidence to establish that there is a genuine issue of material fact remaining for trial. Celotex, 477 U.S. at 322-23; Valinsky, 988 F.2d 126; Careau & Co., 222 Cal. App. 3d at 1388.

2. Breach of the Covenant of Good Faith and Fair Dealing

The law in California is clear; when there is no potential for coverage under an insurance policy, the insurer, as discussed supra, cannot be found liable for a breach of contract, and similarly, cannot be liable for a breach of the covenant of good faith and fair dealing. Warner, 230 Cal. App. 3d 1029; Horseman's Benevolent & Protective Assn., Inc., 222 Cal. App. 3d 816; Clemco Indus., 665 F.Supp. at 830.

Thus, this Court GRANTS Defendant's motion for summary judgment as to the second cause of action in the complaints for breach of the covenant of good faith and fair dealing. Plaintiffs, the party who bears the burden of proof, have failed to provide this Court with any admissible evidence to establish that there is a genuine issue of material fact remaining for trial. Seaman's Direct Buying Serv., 36 Cal. 3d 768; Egan, 24 Cal. 3d 809 (1979); Foley, 47 Cal. 3d 654; California Shoppers, Inc., 175 Cal. App. 3d at 54; Love, 221 Cal. App. 3d at 1151-52; Almon, 724 F.Supp. at 766; Hassard, Bonnington, Roger & Huber, 740 F.Supp. at 792; Henry, 217 Cal. App 3d at 1418-1419.

Any finding of fact deemed to be a conclusion of law is hereby incorporated into these conclusions of law.

B. Plaintiffs' cross-motion

Based upon the analysis supra, Plaintiff's cross-motion for summary judgment is MOOT.

/s/ Lourdes G. Baird
United States District Judge

Entered: June 28, 1994

APPENDIX C.

Order of the Court of Appeals
for the Ninth Circuit
May 28, 1996

Simply Fresh Fruit, Inc. & P & C Services, Inc., Plaintiffs-Appellants, v. The Continental Insurance Company, Defendant-Appellee., No. 94-56061, D.C. No. CV-93-6136-LGB (GHKx) Consolidated.

United States Court of Appeals, for the Ninth Circuit.

May 28, 1996, Before, Poole, Wiggins and Rymer, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Wiggins and Judge Rymer vote to reject the suggestion for rehearing en banc and Judge Poole so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35. Thus, the petition for rehearing is DENIED, and the suggestion for rehearing en banc is hereby REJECTED.

APPENDIX D.

Judgment of the Court of Appeals
for the Ninth Circuit
May 30, 1996

Simply Fresh Fruit, Inc. & P & C Services, Inc., Plaintiffs-Appellants, v. The Continental Insurance Company, Defendant-Appellee. No. 94-56061, CT/AG#: CV-93-06136-LGB.

United States Court of Appeals, for the Ninth Circuit.

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be, and hereby is AFFIRMED.

Filed and entered May 30, 1996.